Digmor Equipment and Engineering Company, Inc. *and* **Sales Drivers and Dairy Employees Local No. 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** Case 31-CA-10288

May 28, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On May 20, 1981, Administrative Law Judge Jay R. Pollack issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a brief in support thereof.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found that Respondent did not violate Section 8(a)(5) and (1) of the Act when it refused to abide by the arbitration provision of a recently expired collective-bargaining agreement.[1] For the reasons discussed below, we reverse this finding.

Respondent and the Union were parties to a collective-bargaining agreement which remained in effect through April 30, 1980.[2] On February 8, Respondent filed an RM petition. On May 2, Respondent discharged unit employee Miguel Cabrera. On May 5, the Union filed a written grievance on Cabrera's behalf. On the same day, the union business agent met with Respondent's personnel administrator to discuss the grievance. Following this discussion, Respondent's personnel administrator noted on the grievance form, under "Disposition: Step #1," that the discharge "stands."

On May 12, pursuant to the grievance-arbitration provision of the expired contract,[3] the Union notified Respondent of its desire to arbitrate the discharge and submitted a request form for an arbitration panel. On May 16, Respondent's personnel administrator informed the Union that the request form had been forwarded to the Company's attorney, but noted that there might be a problem due to the fact that the discharge occurred after the contract expired. On May 28, Respondent's attorney notified the Union that the discharge was not subject to arbitration because it occurred while no collective-bargaining agreement was in effect, and therefore Respondent refused to sign the request form for an arbitration panel.

Respondent's termination report states that the company fired Cabrera because, due to a failure to follow supervisory instructions, he improperly drilled certain aluminum strips which had to be discarded. The termination report reveals that the actions for which Cabrera was discharged occurred—or, at least, began—while the collective-bargaining agreement was still in effect.[4] The report concludes that the alleged misconduct constituted grounds for dismissal under the provision in the collective-bargaining agreement pertaining to discipline and discharge.[5]

The Board has held that, following the expiration of a collective-bargaining agreement, an employer must continue to bargain with a union over terms and conditions of employment, and must adhere to the contractual grievance procedure. And, in *American Sink Top & Cabinet Co., Inc.*, 242 NLRB 408 (1979), relying on *Nolde Brothers, Inc.* v. *Local 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243 (1977), the Board held that, where parties to a collective-bargaining agreement have agreed to subject certain matters to grievance and arbitration, the parties' duty to arbitrate survives the termination of the contract when the dispute is over an obligation arguably created by the expired agreement. We find, contrary to the Administrative Law Judge, that this case is controlled by *American Sink*.

Cabrera was discharged after the contract expired for conduct that occurred at least in part prior to the contract's expiration. The Union filed a grievance on his behalf, which Respondent initially

[1] The Administrative Law Judge found that a question concerning representation existed at the time the contract expired. He believed that existence of a question concerning representation at the time of the Union's request to arbitrate served to distinguish the instant case from *American Sink Top & Cabinet Co., Inc.*, 242 NLRB 408 (1979).

[2] All dates hereinafter refer to 1980, unless otherwise indicated.

[3] According to art. XIX, either party could refer to arbitration "any controversy between the parties . . . over matters provided for in these Articles, or any misunderstanding as to the true interpretation of this Agreement."

[4] The termination report states that routine sheets, prior to April 29, show good parts, but that "after 4-29-80 was when the instructions were not being followed and the parts had to be scraped."

[5] Under art. VI of the expired contract, an employee may be terminated for just cause; however, except for certain listed serious offenses such as gross negligence, an employee may not be suspended or discharged unless he has received two written warnings. It is this provision which the termination report cites as grounds for the discharge. The termination report continues that Cabrera had received a written warning in March regarding the wearing of safety glasses; and that he had failed to work on a particular day in April—but the report does not indicate that Cabrera received a written warning on the latter occasion. Under the grievance-arbitration provision of the contract, an employee may not arbitrate the issuance of a warning notice until Respondent uses it to support a suspension or discharge.

The termination report also states that Respondent believed Cabrera's alleged misconduct constituted gross negligence. Although under the contract that might warrant dispensing with the requirement of prior written warnings before discharge, the Union might still grieve and arbitrate the merits of such a discharge.

processed pursuant to the contract's grievance procedure. When the Union informed Respondent of its intention to arbitrate,[6] Respondent refused. Our holding in *American Sink* is applicable to the instant situation: "The grievance's basis is 'arguably'—at least—the contract, and there is no reason to conclude that the parties had intended the arbitration provisions to end with the contract's term." 242 NLRB at 408.

Moreover, even assuming *arguendo* the relevance of the pendency of a valid RM petition to the question at issue here (i.e., the obligation to arbitrate a grievance the basis of which is arguably the expired contract), we do not agree that the circumstances of this case indicate that the parties did not intend the arbitration provision to survive their contract's expiration. The record discloses that Respondent initially processed the grievance, raised no question about the appropriateness of the grievance, and cited a provision of the contract as grounds for the discharge. Not until May 16, at the earliest, did Respondent claim that there might be a problem with further processing the grievance. But, on May 14, Respondent learned that its employees continued to support the Union.[7] And, by May 28, when Respondent's attorney advised the Union that the Company refused to arbitrate, the Union had already been certified.

Thus, at the time Respondent asserted the expiration of the contract as a basis for refusing to arbitrate, it already knew that the question concerning representation had been resolved by its employees' overwhelming reaffirmation of the Union's majority status. Respondent could not contend that at the time it refused the request to arbitrate it had a good-faith doubt as to the Union's majority status. We do not believe these circumstances evidence that the parties did not intend the arbitration provision to survive the expiration of their contract.[8]

Accordingly, we find that Respondent was under a duty to adhere to the prevailing arbitration provision after the collective-bargaining agreement expired. Therefore, we find that Respondent unilaterally disavowed the continuing operation of that provision by refusing the Union's request to arbitrate the discharge of Miguel Cabrera. We shall order Respondent, upon request by the Union, to submit the discharge of Cabrera to arbitration pursuant to the prevailing arbitration provision.

[6] The expired contract contained a broad arbitration provision, which is quoted *supra*.

[7] In the RM election, originally scheduled for March 19, and eventually conducted on May 14, employees cast 34 ballots for the Union, 7 against, and there were 3 challenged ballots. No party filed objections to the election.

[8] Even if Respondent had entertained a good-faith doubt regarding majority status at the time it refused to arbitrate, we are not convinced that such a situation would warrant inferring that the parties did not intend the arbitration provision over which they had bargained in 1977 to survive the expiration of their contract.

CONCLUSIONS OF LAW

1. Digmor Equipment and Engineering Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Sales Drivers and Dairy Employees Local No. 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following is an appropriate bargaining unit within the meaning of Section 9(b) of the Act:

> All production and maintenance employees and plant clerical employees employed by Respondent at its facility located at 1898 East Colton Avenue, Mentone, California; excluding all office clerical employees, professional employees, draftsmen, purchasing agents, guards, and supervisors as defined in the Act.

4. By unilaterally disavowing the continuing operation of the prevailing arbitration provision by refusing the Union's request to arbitrate the discharge of Miguel Cabrera, Respondent violated Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has committed no other unfair labor practices.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and take certain affirmative action which we find necessary to effectuate the policies of the Act.

Having found that Respondent's unilateral disavowal of the prevailing arbitration provision by refusing the Union's request to arbitrate the discharge of Miguel Cabrera violated Section 8(a)(5) and (1) of the Act, we shall order Respondent, upon request by the Union, to submit the discharge of Cabrera to arbitration pursuant to the prevailing arbitration provision.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Digmor Equipment and Engineering Company, Inc., Mentone, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unilaterally disavowing the continuing operation of the prevailing arbitration provision by refusing the Union's request to arbitrate the discharge of Miguel Cabrera pursuant to that provision.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Upon request by the Union, submit the discharge of Cabrera to arbitration pursuant to the prevailing arbitration provision.

(b) Post at its facility in Mentone, California, copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

CHAIRMAN VAN DE WATER, concurring:

I agree with my colleagues that Respondent violated the Act by refusing to arbitrate the discharge of Miguel Cabrera. Although the discharge of Cabrera occurred after the expiration of the collective-bargaining agreement, Respondent's termination report reveals that the discharge was based on conduct that began prior to the contract expiration and states that dismissal was warranted under the provision of the collective-bargaining agreement pertaining to discipline and discharge. Thus, under the Supreme Court's decision in *Nolde*,[10] Respondent is required to arbitrate. I would not find, however, that discharges based on conduct occurring after the expiration of a contract are arbitrable. To the extent that *American Sink*,[11] because of its factual ambiguities,[12] is construed as reaching a contrary conclusion, I do not approve or accept that decision.

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[10] *Nolde Brothers, Inc.* v. *Local 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243 (1977).

[11] *American Sink Top & Cabinet Co., Inc.*, 242 NLRB 408 (1979).

[12] In *American Sink, supra*, the discharged employee had been injured and had not been on the active payroll for "several months" prior to his July 24, 1978, discharge. The contract had expired May 1, 1978. Under these circumstances, and on the basis of these limited facts, it is unclear whether his discharge was prompted solely by conduct occurring after the contract expired or in part to conduct while the contract was in effect.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT unilaterally disavow the continuing operation of the prevailing arbitration provision by refusing the Union's request to arbitrate the discharge of Miguel Cabrera pursuant to that provision.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL, upon request by the Union, submit the discharge of Miguel Cabrera to arbitration pursuant to the prevailing arbitration provision.

DIGMOR EQUIPMENT AND ENGINEERING COMPANY, INC.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge: This case was heard before me in San Bernardino, California, on March 31, 1981. Pursuant to a charge filed against

Digmor Equipment and Engineering Company, Inc. (herein called Respondent), by Sales Drivers and Dairy Employees Local No. 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Union), on August 1, 1980,[1] the Regional Director for Region 31 of the National Labor Relations Board issued a complaint against Respondent on September 24, alleging that Respondent committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*

The principal question presented for decision is whether Respondent violated Section 8(a)(5) and (1) of the Act by refusing to abide by the arbitration provision of its recently expired collective-bargaining agreement with the Union.[2]

The parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs of the parties, I make the following:

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

At all times material herein, Respondent has been a California corporation, with an office and principal place of business in Mentone, California, where it is engaged in the manufacture and nonretail sale of construction equipment. In the course and conduct of its business operations, Respondent annually purchases and receives goods or services valued in ecess of $50,000 directly from suppliers located outside the State of California. Accordingly, Respondent admits and I find that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

On December 8, 1976, the Union was certified as the exclusive collective-bargaining representative of Respondent's employees in an appropriate bargaining unit.[3] Thereafter, Respondent and the Union entered into a collective-bargaining agreement covering Respondent's production, maintenance, and plant clerical employees effective by its terms from May 1, 1977, until April 30, 1980. The parties each filed timely notice of intent to terminate the contract. As of the date of the instant hearing, agreement on a succeeding collective-bargaining contract had not been reached.

On February 8, 1980, the Respondent filed a petition in Case 31-RM-802, seeking an election among the unit employees. Thereafter Respondent and the Union entered into a Stipulation for Certification Upon Consent Election, which provided for an election to be held on March 19. However, on February 27, the Union filed a blocking charge in Case 31-CA-9823 alleging that Respondent had violated Section 8(a)(1) and (5) of the Act. That charge was dismissed by the Regional Director on April 8. After dismissal of the charge, Respondent and the Union entered into a second Stipulation for Certification Upon Consent Election, which provided for an election to be held on May 14. This stipulation was approved by the Regional Director and the election was held on May 14. The election resulted in a majority of ballots being cast in favor of the Union. On May 22, the Regional Director certified the Union as the exclusive collective-bargaining representative of the unit employees. Negotiations regarding a succeeding contract began on May 29 and had not concluded by the time of the instant hearing.

On May 2, Respondent discharged Miguel Cabrera, a unit employee. Respondent's termination report for Cabrera indicated that it discharged the employee for gross negligence and for failing to follow instructions from his supervisor. The termination report contains, *inter alia*, the following sentence pertinent to the issues herein: "This is sufficient grounds for dismissal as agreed upon by the company and the union." (See art. VI, sec. 1.)[4] On May 5 the Union presented a grievance to Respondent concerning the discharge of Cabrera.[5] Respondent's personnel director informed the Union that "the termination stands." By letter dated May 12, the Union notified Respondent that it was advancing the Cabrera discharge dispute to arbitration. By letter dated May 16, Respondent informed the Union that it had forwarded the Union's request for arbitration to its attorney. On May 28, Respondent's attorney refused to arbitrate the grievance concerning Cabrera's discharge, stating that "the

[1] Unless otherwise stated, all dates refer to calendar year 1980.

[2] The original charge alleged certain other violations of Sec. 8(a)(1), (3), and (5) of the Act which were dismissed by the Regional Director on September 15.

On September 3, the Union filed a charge against Respondent in Case 31-CA-10393, alleging a general refusal to bargain. On October 29, the Regional Director dismissed that charge. The Union appealed the Regional Director's dismissal of the case and, on December 17, the General Counsel denied the appeal.

[3] All production and maintenance employees and plant clerical employees employed by Respondent at its facility located at 1898 East Colton Avenue, Mentone, California; excluding all office clerical employees, professional employees, draftsmen, purchasing agents, guards, and supervisors as defined in the Act.

[4] Art. VI, sec. 1, of the recently expired contract provided:

ARTICLE VI - DISCIPLINE AND DISCHARGE

Section 1. Employees may be disciplined and terminated for just cause. Except for serious offenses such as theft; gross negligence; serious insubordination; use, possession or being under the influence of unprescribed drugs, or alcohol during working hours; deliberate falsification of records; provoking a fight on Company property; deliberate destruction or damage of Company property or the property of another employee; and possessing firearms or dangerous weapons on Company property, an employee shall not be suspended or discharged unless he has first received two (2) written warning notices.

[5] The charge initially alleged that Cabrera's discharge violated Sec. 8(a)(3) and (1) of the Act. As noted above, the allegation of the charge was dismissed prior to the instant hearing.

discharge occurred while no collective bargaining agreement was in effect, and, accordingly, this discharge was not subject to arbitration." That refusal to proceed to arbitration led to the filing of the instant charge.

The grievance arbitration provision of the recently expired collective-bargaining agreement provided as follows:

> ARTICLE XIX - GRIEVANCE ARBITRATION
>
> *Section 1.* All grievances and disputes will be resolved amicably between the parties hereto if possible. If not so resolved, either party, after giving ten (10) days written notice to the other party, may, in any controversy between the parties hereto over matters provided for in these Articles, or any misunderstanding as to the true interpretation of this Agreement, refer the point or points in question to a committee of three (3) for arbitration; one (1) to be selected by the Employer, one (1) to be selected by the Union and the third disinterested party to be selected by the first two (2).
>
> *Section 2.* In the event the parties are unable to agree on the third party, under the provisions of Section 1., above, an arbitrator shall be selected from a panel of seven (7) names submitted by the Federal Mediation and Conciliation Service by alternate striking of names until one remains. The cost of the arbitrator shall be divided equally by the parties hereto except that each party shall bear the expense of the arbitrator appointed by him.
>
> *Section 3.* During such time as the matter is pending before the Arbitration Board: there shall be no lockout, strike, boycott or stoppage of work. The decision of the Arbitration Board shall be final and binding upon both parties hereto, and in no case shall the period of arbitration exceed fifteen (15) days from date of submission to arbitration. Any warning notice issued under the provisions of this labor Agreement shall not be subject to arbitration until such time as it is used to support a suspension or discharge.

Analysis

Section 8(a)(5) of the Act imposes an affirmative duty on an employer to bargain with the exclusive bargaining representative of its employees over "wages, hours and other terms and conditions of employment." The employer's duty is breached when, absent bargaining to impasse or union waiver, an employer alters existing job terms without notifying and bargaining with the Union concerning the change. *N.L.R.B.* v. *Benne Katz, d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736, 743–748 (1962). Further, the employer's duty to bargain over changes in job terms is not relieved by the expiration of a contract. *N.L.R.B.* v. *Sky Wolf Sales*, 470 F.2d 827, 830 (9th Cir. 1972). Prior to 1979, the Board rejected the notion that arbitration is a term or condition of employment that by operation of statue continues even after the contract embodying it has terminated. Thus, in *Hilton-Davis Chemical Co.*, 185 NLRB 241, 242 (1970) the Board stated that "arbitration is, at bottom, a consensual surrender of the economic power which the parties are otherwise free to utilize." The Board held that inasmuch as an agreement to arbitrate is a matter of mutual consent, the lapse of that agreement due to contract expiration is a bar to the agreement's enforcement.

In *American Sink Top & Cabinet Co., Inc.*, 242 NLRB 408 (1979), the Board, relying on the Supreme Court case of *Nolde Brothers, Inc.* v. *Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243 (1977), overruled its *Hilton-Davis* decision. In *American Sink Top*, the Board ordered arbitration of a grievance concerning the discharge of an employee who had been discharged after the expiration of the contract. The Board held that the basis of the grievance was "'arguably'—at least—the contract, and there [was] no reason to conclude that the parties intended the arbitration provisions to end with the contract's term."

Respondent argues that at the time of Cabrera's discharge it had a good-faith doubt of the Union's majority status and therefore could not have been guilty of a refusal to bargain in good faith at the time of Cabrera's discharge. As shown above, at the time of Cabrera's discharge, there was pending a representation petition in Case 31-RM-802, which ultimately resulted in an election held on May 14. To support such a petition the Respondent must have demonstrated by objective considerations that is had some reasonable basis for believing that the Union had lost its majority status. See, e.g., *United States Gypsum Company*, 157 NLRB 652 (1966). Based on a good-faith doubt of the Union's majority status, supported by such objective considerations, Respondent could have defended any refusal-to-bargain charges. See, e.g., *Terrell Machine Company*, 173 NLRB 1480, 1480–81 (1969), enfd. 427 F.2d 1088 (4th Cir. 1970). Accordingly, from February 8, the date the petition was filed, until May 14, the date of the election, a real question concerning reprsentation had been raised and Respondent was not obligated to bargain with the Union until the question concerning representation had been resolved by the Board.[6] However, until the contract expired the Union could still administer its contract and process grievances. Cf. *C & S Industries, Inc.*, 148 NLRB 454 (1966), and *Telautograph Corporation*, 199 NLRB 892 (1972). Upon expiration of the contract, Respondent had no obligation to bargain with the Union until the question concerning representation was resolved on May 14. Thus the instant case raises a novel issue of whether the principles embodied in *American Sink Top* apply during the pendency of a question concerning representation.

I find that the *American Sink Top* decision presupposes the presumption of continuing majority status of the incumbent union. Here the presumption of majority status had been rebutted by Respondent's objective considerations in support of the representation petition. Thus, due to the question concerning representation, when the con-

[6] This finding should not be misconstrued as holding that Respondent's filing of the representation petition would excuse a refusal to bargain. See *N.L.R.B.* v. *Top Manufacturing Co.*, 594 F.2d 223, 225 (9th Cir. 1979). Rather, I find that the objective considerations sufficient to support a valid RM petition are sufficient to defend a refusal-to-bargain case. See *United States Gypsum, supra.*

tract expired, Respondent, unlike the employer in *American Sink Top*, was not under a duty to adhere to prevailing terms and conditions of employment after the expiration of the contract. Until the question concerning representation was resolved by the election, Respondent was not obligated to bargain with the Union. *A fortiori* Respondent was not required to abide by the terms of the recently expired contract. Under these circumstances, I find that it would be inappropriate to presume that the parties intended the arbitration provision to survive the expiration of the contract. See *Cardinal Operating Company*, 246 NLRB 279 (1979).

For the foregoing reasons I find that Respondent did not violate Section 8(a)(1) and (5) of the Act as alleged, when it refused to abide by the arbitration provision of its recently expired collective-bargaining agreement with the Union.

Upon the foregoing findings of fact, and upon the entire record in this proceeding, I make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following is an appropriate bargaining unit within the meaning of Section 9(b) of the Act:

> All production and maintenance employees and plant clerical employees employed by Respondent at its facility located at 1898 East Colton Avenue, Mentone, California; excluding all office clerical employees, professional employees, draftsmen, purchasing agents, guards, and supervisors as defined in the Act.

4. Respondent did not violate Section 8(a)(5) and (1) of the Act as alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]